600 13th Street, NW
Suite 790
Washington, DC 2005

August 30, 2007

The Honorable Marlene H. Dortch
Secretary
Federal Communications Commission.
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

In the matter: MB Docket No. 07-42, Development of Competition and Diversity in Video Programming Distribution and Carriage

Dear Madame Secretary:

Black Television News Channel (BTNC) applauds the Commission's focus on eliminating the barriers that have denied minority owned and operated networks, as well as all other independent networks, access to the cable television marketplace.

Television remains the world's most influential medium. It is vital to our democracy that this pipeline provides diverse content representative of our diverse population. With this in mind, BTNC offers the following comments in response to the Commissions Notice of Proposed Rulemaking Procedure MB Docked No. 07-42, concerning *leased access* and the *Program Carriage Rules*.

Background

Black Television News Channel (BTNC) is an independently owned 24-hour cable television news channel that serves to inform, educate, inspire and empower our nation's African American communities. BTNC, in addition to six independent cable networks serving African American television viewers (e.g. Black Family Channel, MBC News, African Channel, Black Women's TV, The Real Hip Hop Network and Christian Television Network) has been denied widespread distribution by cable television's two primary gatekeepers. However, BTNC has successfully obtained satellite distribution for its launch in 2008.

African American households continue to be cable television's heaviest users, watching 40% more television (77.4 hours weekly) than any other market segment and spending the majority of their entertainment dollar on cable TV. Cable television's trade magazine, *Multichannel News*, recently reported that cable television's most underserved audience—African Americans—are the industry's most valuable customer buying more pay services, owning more HDTV television sets, and purchasing more video-on-demand (VOD) movies than the overall cable television population. Despite these facts, today only Viacom's **BET** and Comcast-owned **TV One** have garnered widespread cable television distribution. While the country is becoming more diverse, it is clear that cable television programming is not. A review of the past decade of industry practices and programming trends is troubling:

- Black owned and operated networks with widespread distribution were reduced from one to none!
- Currently, all seven Black owned and operated networks have been censored from the television marketplace.
- Black Family Channel closed its doors after a decade of operation and millions of dollars spent. The minority owned Black Family Channel was denied sufficient distribution to survive in the cable TV marketplace.
- MSO consolidation has permitted two cable giants (Comcast and Timer Warner) to control a statistical majority of the cable television marketplace.
- Comcast and Time Warner, today, control access to 45 of the Top 50 African American television markets.
- All Comcast and Time Warner owned [affiliated] networks have been provided widespread cable television distribution.
- **TV One** relinquished nearly 40% (a majority controlling interest) of its equity to cable giant Comcast before gaining widespread cable television distribution at a record pace. Today, Comcast-owned **TV One** is distributed to more than 38 million homes and 45 of the Top 50 African American markets.
- The NFL Channel, an independent sports network, was granted widespread cable distribution until cable giant Comcast moved The

NFL Channel to its "D2" sports tier earlier this year. This move leaves The NFL Channel with satellite as the major source for its distribution.

- Each of the other 119 independent channels has either been offered limited distribution that requires negotiation for carriage on a "system-by-system" basis or denied distribution entirely.
- While minorities represent one-third of our overall population, the percentage of minority broadcast licenses remains in single digits today.
- Six of the top 10 most popular African American sitcoms have been cancelled, including Fox's popular *Bernie Mac Show*.
- The CBS series, *The Unit*, starring Dennis Haysbert remains the only one-hour television drama featuring a black actor in a leading role.

We are witnessing the "death of diversity" as cable television's two premier gatekeepers censor independent voices from America's television households to protect their own programming investments.

Leased Access

Leased access has proven to be an effective tool for producers of unique local television programming. However, *leased access* does not support the development of independent national programming. An independent network cannot be required to pay an MSO for distribution, when those same dollars will be used by the MSO to develop competing affiliated programming networks. Affiliated networks already enjoy the operational synergies and economic advantages offered them by their MSO affiliation. These advantages include cross-channel and customer service promotions, favorable channel positions, attractive license fees and access to capital. Independently owned and operated networks, such as BTNC, simply can not survive economically in a *leased access* environment.

For these reasons, BTNC's comments will focus on the critically important implementation of the Commission's *Program Carriage Rules.*

***Program Carriage Rules* – the development of competition and diversity in video programming distribution**

The *Program Carriage Rules* clearly prohibit a cable operator from requiring *"a financial interest in any program service as a condition of carriage"* or from engaging in conduct that unreasonably restrains *"the ability of a non-affiliated programming vendor to compete fairly by discriminating against such vendor on the basis of affiliation or non-affiliation."* Yet, the anti-competitive practices described above are generally the norm today and are becoming more blatant each year as consolidation results in greater market control among fewer and more powerful MSOs. As mentioned earlier, today two MSOs control a statistical majority of the cable television marketplace and 45 of the Top 50 African American DMAs.

The Commission recognized long ago that vertically integrated MSOs have operational and economic incentives to deny carriage or discriminate against independent programmers. To overcome these incentives in the mid-'90s, independent programmers began to offer MSOs equity for carriage and/or financial launch support. Until recent years, the first words out of the MSO gatekeeper's mouth were: "How much equity are you offering? We want "X" amount of dollars in launch support." An independent programmer at least had the opportunity to pitch his/her product and its value to the MSO. Today, it is a much more challenging environment.

Why is it that no independent cable networks have taken advantage of the Commission's Program Carriage Rules to seek relief from obvious discriminatory practices?

There are several reasons. The first reason is, perhaps, the most concerning; it is the fear of retaliation by one or more major carriers. The second reason is the unpredictable cost and time associated with the complaint and enforcement process. The third reason is the uncertainty concerning the burden of proof required by any one individual programmer. Finally, the fourth reason is the uncertainty concerning the Commission's willingness to provide sufficient relief, or more specifically, to mandate the carriage of the non-affiliated network on terms that are no more burdensome or less favorable than those terms being applied to affiliated networks with similar programming content, quality and audience appeal.

<u>Fear of Retaliation</u>

The Commission must adopt rules intended to protect non-affiliated networks from potential retaliation by major carriers. Non-affiliated programmers should be afforded this protection throughout the review and enforcement period. Likewise, it is also BTNC's position that frivolous complaint filings by non-affiliated programmers should be penalized economically.

Cost & Time (Arbitration)

BTNC strongly supports a binding arbitration process for all *Program Carriage Rule* complaints determined by the Commission to meet the minimal *prima facie* burden of proof.

The promulgated arbitration process must have a predictable cost and timetable. Cost associated with the complaint process should be awarded by the arbitrator in a "winner takes all" fashion. If it is determined that a non-affiliated network has been discriminated against, the cable carrier should be burdened with the entire legal cost of both parties.

The arbitration process should include a timely 60-day complaint vetting period by the Commission. Once the Commission has decided that a complaint satisfies the minimal *prima facie* burden of proof, it should refer the complaint to an independent arbitrator. The Commission should identify the factors an arbitrator is to consider when reviewing a complaint.

BTNC requests that the Commission establish clear policy guidelines to drive the arbitration process. The guidelines must echo the following statutory mandates: 1) The distribution of non-affiliated network programming is vital to the public interest; 2) Such distribution must not be withheld or impeded on the basis of affiliation or non-affiliation; and 3) Affiliated and non-affiliated networks of similar content, quality and demand must be carried on comparable terms.

Below is a sampling of 20 factors that an arbitrator should consider when evaluating a complaint:

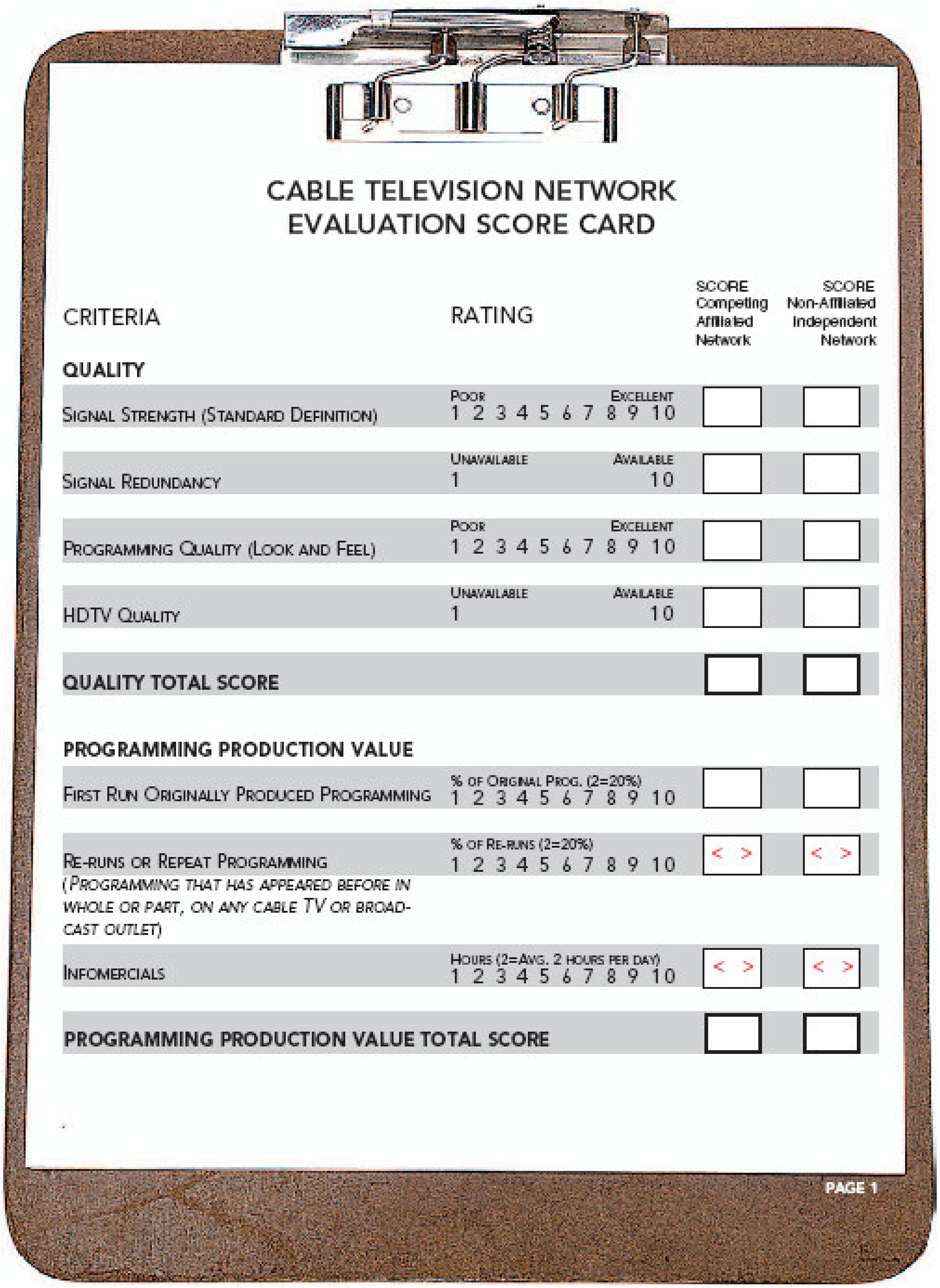
- <u>MSO Past Business Practices</u> Does the MSO have a history of denying access to non-affiliated networks?
- <u>MSO Market Share</u> Does the MSO's distribution represent a significant percentage of the cable television marketplace?
- <u>Vertical Integration</u> Has the MSO made investments in whole or part in cable television programming services?
- <u>Affiliated Competition</u> Does the MSO own, in part, interest in a programming service that could potentially compete with the non-affiliated network both for advertising dollars and viewers? If yes, what percentage of ownership does the MSO have?
- <u>Good Faith</u> Has the MSO negotiated carriage in good faith with the non-affiliated programmer? Has the MSO reasonably responded to correspondence it receives from the non-affiliated

programmer? Likewise, has the non-affiliated programmer reasonably and respectfully solicited the MSO's carriage?

- Market Competition Is the non-affiliated network's target audience underserved or over-served by the MSO's program lineup today?
- Market Demographics Does the MSO serve customers targeted by the non-affiliated programming?
- Reasonable Demands for Carriage Has the MSO made unreasonable technical, operational and/or economic demands of the non-affiliated network?
- Market Access Is the MSO providing reasonable marketplace access or distribution to the non-affiliated network?
- Subscriber Count Is the non-affiliated network distributed as broadly as competing affiliated networks with similar program content, quality and audience appeal?
- Original Programming Does the non-affiliated network intend to produce original programming or first-run programming? If yes, how will the quantity and quality of the non-affiliated network's original programming compare to that of the MSO's competing affiliated network?
- Program Value Will the distribution of the non-affiliated network by the MSO add value to the MSO's programming lineup?
- Subscriber Lift Value Can the distribution of the non-affiliated programming network offer the MSO subscriber lift?
- Launch Support Has the non-affiliated network demonstrated a commitment to provide for the marketing and promotion of its programming to MSO subscribers and potential subscribers?
- Technical Quality Has the non-affiliated network demonstrated its intent to offer a quality program signal?
- HDTV Added Value Does the non-affiliated network offer an HDTV simulcast?
- Demand for Programming Is there customer demand for the non-affiliated network's programming?
- Educational Value Does the non-affiliated network offer originally-produced educational programming? How does this original programming compare to competing affiliated networks' educational value?
- Family Programming Is the non-affiliated network's programming suitable for family viewing?
- Obscenity Is the non-affiliated network's programming likely to be considered offensive or obscene to viewers?

In cases whereby an MSO controls significant market share and is vertically integrated offering affiliated programming that competes for the same viewers and/or the same potential advertisers as the non-affiliated network, the Commission should mandate that the non-affiliated network receive carriage terms equally as favorable as the affiliate. This premise assumes that the two networks (affiliated and non-affiliated) would be of similar quality and value if provided similar distribution by the MSO.

It will be necessary for the Commission to evaluate both affiliated and non-affiliated programming services for the purpose of comparison. To assist in this process, BTNC offers the following *Cable Television Network Evaluation Score Card*. While it is understood that such comparisons are highly subjective, this tool may help guide the Commission and/or arbitrator through the review and evaluation process.



CABLE TELEVISION NETWORK EVALUATION SCORE CARD

CRITERIA	RATING	SCORE Competing Affiliated Network	SCORE Non-Affiliated Independent Network
QUALITY			
Signal Strength (Standard Definition)	Poor 1 2 3 4 5 6 7 8 9 10 Excellent		
Signal Redundancy	Unavailable 1 10 Available		
Programming Quality (Look and Feel)	Poor 1 2 3 4 5 6 7 8 9 10 Excellent		
HDTV Quality	Unavailable 1 10 Available		
QUALITY TOTAL SCORE			
PROGRAMMING PRODUCTION VALUE			
First Run Originally Produced Programming	% of Original Prog. (2=20%) 1 2 3 4 5 6 7 8 9 10		
Re-runs or Repeat Programming *(Programming that has appeared before in whole or part, on any cable TV or broadcast outlet)*	% of Re-runs (2=20%) 1 2 3 4 5 6 7 8 9 10	< >	< >
Infomercials	Hours (2=Avg. 2 hours per day) 1 2 3 4 5 6 7 8 9 10	< >	< >
PROGRAMMING PRODUCTION VALUE TOTAL SCORE			

PAGE 1

CRITERIA	RATING	SCORE Competing Affiliated Network	SCORE Non-Affiliated Independent Network
PROGRAMMING CONTENT VALUE			
Entertainment Value	Poor 1 2 3 4 5 6 7 8 9 10 Strong		
Educational Value	Poor 1 2 3 4 5 6 7 8 9 10 Strong		
News and Informational Value	Poor 1 2 3 4 5 6 7 8 9 10 Strong		
Family Viewing	Poor 1 2 3 4 5 6 7 8 9 10 Strong		
Inspirational Value	Poor 1 2 3 4 5 6 7 8 9 10 Strong		
Social Value	Poor 1 2 3 4 5 6 7 8 9 10 Strong		
Obscenity or Offensive Programming	High 1 2 3 4 5 6 7 8 9 10 None		
PROGRAMMING CONTENT VALUE TOTAL SCORE			
ECONOMICS			
Cost (License Fees)	High 1 2 3 4 5 6 7 8 9 10 Free		
Subscriber Lift Potential	None 1 2 3 4 5 6 7 8 9 10 High		
Advertising Sales Availabilities	None 1 2 3 4 5 6 7 8 9 10 High		
Launch Support (Marketing & Promotion)	None 1 2 3 4 5 6 7 8 9 10 High		
Cross-Platform Sales and Promotions	None 1 2 3 4 5 6 7 8 9 10 High		
ECONOMIC TOTAL SCORE			

PAGE 2

CRITERIA	RATING	SCORE Competing Affiliated Network	SCORE Non-Affiliated Independent Network
MARKET DEMOGRAPHICS			
Viewer Demand	None – Heavy 1 2 3 4 5 6 7 8 9 10		
Marketing Competition for Target Viewers	Over-served – Underserved 1 2 3 4 5 6 7 8 9 10		
Target Audience market Size	Small – Large 1 2 3 4 5 6 7 8 9 10		
Viewing habits of Target Audience	None – Heavy 1 2 3 4 5 6 7 8 9 10		
Digital TVs Purchased by Target Audience	None – Heavy 1 2 3 4 5 6 7 8 9 10		
Free VOD Viewed by Target Audience	None – Heavy 1 2 3 4 5 6 7 8 9 10		
Pay VOD Purchased by Target Audience	None – Heavy 1 2 3 4 5 6 7 8 9 10		
Purchase of Pay (Premium) Services by Target Audience	None – Heavy 1 2 3 4 5 6 7 8 9 10		
Economic Strength of Target Market Segment	Slow Growth – Fast Growth 1 2 3 4 5 6 7 8 9 10		
MARKET DEMOGRAPHIC TOTAL SCORE			
OVERALL SCORE			

PAGE 3

Burden of Proof

The Commission's rules currently provide that any complaint alleging a violation of Section 616 (a)(3) Prohibition on Discrimination must demonstrate that the alleged discrimination is *"on the basis of the affiliation or non-affiliation"* of the network. This burden of proof remains vague today.

If a cable company simply refuses to acknowledge the existence of a non-affiliated network that may provide competition to one or more of its affiliated program services, then is the cable company guilty of a discriminatory action?

BTNC's principals have aggressively reached out to programming and operational executives at the major MSOs by phone, e-mail and letters for more than two years. In the case of Comcast, BTNC's efforts to establish a dialog also include the overnight delivery of marketing materials, detailed subscriber lift and ad-sales revenue forecasts for each Comcast DMA, promotional videos and research concerning African American viewing habits, and audience demographics. BTNC has even conducted 18 months of "on air" programming trials, testing and perfecting its programming content, operational models, it's "look and feel" and perfecting it for potential distribution to Comcast's customers. Comcast has made no reply, not even to acknowledge the receipt of videos or materials. BTNC has attempted to communicate unsuccessfully with Comcast every 14 days for more than a year. The MSO simply refuses to acknowledge the existence of BTNC as a non-affiliated network. Yet **TV One**, which is majority-owned by Comcast and targets African American adults (as does BTNC), has enjoyed widespread distribution. **TV One** announced its launch plans months after BTNC and years after the launch of the now defunct Black Family Channel. At the same time, BTNC has been well received by satellite television distributors, telecom and other less dominant MSOs. Is Comcast's lack of acknowledgement considered discriminatory? By ignoring non-affiliate networks, Comcast has disconnected these networks from the cable television pipeline, thus protecting its ownership interest in competing affiliated networks.

Other forms of MSO discriminatory practices are much more subtle; but these practices are, nevertheless, equally as troubling to independent programmers. For example, independent networks are often required to negotiate carriage on a "system-by-system basis," while competing affiliated networks sign national distribution agreements with MSO corporate offices. No ad-supported independent network has ever gained sufficient national distribution to survive in the highly competitive marketplace absent a corporate distribution agreement. Local and regional programming executives will not waste time talking to a non-affiliated network representative who does not have the contractual endorsement of their corporate gatekeepers. Fledgling (start-up) independent networks can spend millions of dollars courting local cable operators to simply be denied access in the end.

The Commission should clearly define that the following two business practices are considered discriminatory:

- Failure or refusal to discuss carriage or negotiate in good faith with an independent network.
- Requiring an independent network to negotiate carriage on a "system-by-system basis" absent a national or corporate affiliate distribution agreement.

<u>Regulatory Relief (Mandatory Carriage on Fair Terms)</u>

Until recently, it was not clear that the Commission could, and/or would, provide mandatory carriage for a non-affiliated network that it determines to be unfairly denied carriage. Today, it is believed that the Commission can, and in fact has the statutory obligation to, mandate carriage of non-affiliated networks that have been denied market access on the basis of affiliation or non-affiliation.   In the event that an MSO owns an interest in a program service that offers programming similar to the independently owned and operated network (Competing Affiliated Network), the Competing Affiliated Network should not be afforded less burdensome or more favorable carriage terms. For example, both the Competing Affiliated Network and the non-affiliated network should be treated similarly by the MSO with respect to the following criteria:

- Video platform
- Program packaging
- Channel positioning
- License fee competition
- HDTV carriage fees
- Launch support obligations
- Transmission and technical requirements
- Cross-channel and customer service promotions
- Forfeiture of advertising availabilities to the MSO
- Other operational and economic constraints, requirements and obligations

Is it the Commission's intent to insure that non-affiliated networks are truly treated in the same manner as affiliated networks? BTNC requests that the above policy guideline be clearly articulated by the Commission.

BTNC's principals look forward to working with the Commission to advance this important public policy initiative. Freedom of Speech and the right for all people to be heard have been at the center of our democracy since the framing of our government. The collective ideas, viewpoints, and wisdom of our diverse citizenry are what make America so strong. We can no longer allow cable television's gatekeepers to censor minority viewpoints from America's television homes.

Sincerely,

JC Watts, Jr.
Chairman
Black Television News Channel, LLC